LAI CHON FOO @ LAI CHAN FOO

v.

K.N. WONG (M) SDN. BHD.

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO. KG. 122 OF 1992/II]
16 AUGUST 1993

LAND LAW: Removal of caveat - Sarawak Land Code s. 177 - Proprietor executed Promissory Note permitting defendant to caveat land - Whether Promissory Note gave rise to caveatable interest - Whether equitable charge created over land - Section 173 - Real issues not pleaded in affidavits - Court urged to give judgement contrary to law - Whether Court could address points not specifically raised by parties.

WORDS AND PHRASES: "Any unregistered agreement or other instrument" - Sarawak Land Code s. 173 - National Land Code s. 323.

The plaintiff took a loan from the defendant and executed a Promissory Note in favour of the defendant wherein as security the defendant was given permission to caveat the plaintiff's land. Pursuant to the Promissory Note the said land was caveated upon by the defendant under s. 173 of the Sarawak Land Code (Cap. 81). For more than 3 years running the defendant did not take proper action to recover the loan and the plaintiff applied under s. 177 of the Code to remove the defendant's caveat on the ground that the claim for money arising out of the promissory Note had been statute barred and therefore the defendant had no more caveatable interest in the land.

The plaintiff had the impression that the Promissory Note had conferred upon the defendant a caveatable interest over the said land. In the event, the real issue of whether or not the defendant *ab initio* had any caveatable interest and therefore the issue of *locus standi* of the defendant to lodge the said caveat, had not been specifically pleaded by the parties.

The Court deliberated on the question of whether it was entitled to take up the aforesaid unpleaded points and having answered the same in the affirmative took the liberty to determine the true position of the law facing the unpleaded issues.

Held:

[1] The Promissory Note does not create any equitable charge over the said land in favour of the defendant and nor does it confer upon the defendant any caveatable interest in the land. The defendant therefore has no legal standing to caveat the said land.

[2] The Promissory Note in this case is only a document concerning payment of debt by the plaintiff to the defendant and not a document relating to the transfer of or other dealing with the said land and nor is it a document evidencing title to the land. This being the case it cannot be caught by the phrase "any unregistered agreement or other instrument" appearing in s. 173 of the Code, with the result that the defendant cannot be said to be a person claiming to be entitled to or to be beneficially interested in the said land by virtue of an unregistered agreement or other instrument as stipulated in that section.

[Plaintiff's application granted].

Cases referred to:
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 ***(refd)***
Lee Ah Thaw & Anor. v. Lee Chun Tek [1978] 1 MLJ 173 ***(refd)***
Mohamed bin Oki v. Lau Hieng Ming [1981] 2 MLJ 88 ***(foll)***

Legislation referred to:
Land Code, ss. 2, 173(a), 177, 179(2)
Limitation Ordinance of Sarawak

For the plaintiff - Wong Siong Tung; M/s. Loke King & Co.
For the defendant - Michael Tiong Hok Choon; M/s. Lau & Co.

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:
This is an application by the plaintiff for the removal of a caveat lodged by the defendant company over the plaintiff's $^1/_3$rd undivided right titles share and interest in the parcel of plaintiff's land situate at 8th Mile, Railway Line, Kuching, containing an area of 1.27 acres, more or less, and described as Lot 289 Block 59 Kuching Central Land District (hereinafter referred to as "the said land"). The said caveat of the defendant was registered at the Kuching Land Registry Office on 5 December 1980 as

Instrument No. L. 13522/1980. See exhibit "LC1" to the affidavit of Lai Chon Foo @ Lai Chan Foo in support of the application, affirmed on 6 June 1992. The ground for wanting the said caveat to be removed is that the defendant has no more caveatable interest in the said land.

The said caveat was lodged by the defendant pursuant to clause 2 contained in the Promissory Note dated 21 July 1980 executed by the plaintiff in favour of the defendant company. The plaintiff initially owed the defendant company a sum of RM75,834.03. He failed to settle the amount due. The Promissory Note was executed in consideration of the defendant refraining from instituting immediate legal action against the plaintiff for the sum owed and allowing the plaintiff to pay the sum of RM51,523.56 only as full payment of the debt due **without interest** by two instalments each on a specified date, the last instalment being within three years from the date of the Promissory Note, which was 21 July 1980. In consideration of the foregoing indulgence granted by the defendant to the plaintiff and as security in respect of the said sum, the plaintiff permitted the defendant to lodge a caveat against the said land until full repayment thereof. In the event of the plaintiff failing or refusing to pay the said sum in accordance with the manners stated, the agreement stipulates that the defendant is at liberty to demand immediate payment of the said sum or any part thereof remaining outstanding. Thus the security provided is not the plaintiff's said land but the permission for the defendant to caveat the said land.

In his application for the removal of the said caveat, the plaintiff did not allege that *ab initio* the defendant has no caveatable interest. He applied for the said caveat to be removed on the ground that the claim for money due arising out of the Promissory Note which, according to him, has created the defendant's interest in the said land, is now statute barred. He admitted that he did not pay anything to the defendant since he executed the Promissory Note. According to the Promissory Note, the last instalment due was 21 July 1983. Since no action was taken by the defendant within three years from the due date for payment for its recovery, as provided by the Limitation Ordinance of Sarawak, the plaintiff contends that the defendant has lost his caveatable interest in the said land. So the caveat must be removed. So, it is to be noted that but for the alleged limitation, the plaintiff is not disputing the caveatable interest of the defendant in the said land.

By the defendant's affidavit in opposition affirmed by Datuk Wong Kie Nai, the Managing Director of the defendant company on 15 September 1992, it is alleged that the plaintiff made certain payment of the said debt on 30 May 1985 for RM200 and the defendant commenced legal action against the plaintiff for the balance of the debt due in Sibu High Court Suit No. KG. 17 of 1988. What in fact the defendant is saying is that the period of limitation is revived by the alleged payment of the RM200 by the plaintiff. As such the three years limitation began to run from 30 May 1985 and not from the original date of 21 July 1983 based on the Promissory Note. The writ in the suit was issued by the defendant on 24 February 1988. So, here if the defendant's allegation is correct, by the time it issued the writ, it was still within the limitation period. Therefore, the ground for the application to remove the caveat must necessarily fail.

The plaintiff by his affidavit in reply affirmed on 22 September 1992 however, denied ever making the said payment of RM200 or at all on 30 May 1985. He supported his contention based on the further and better particulars supplied by the defendant relating to the suit dated 29 June 1988 wherein the said payment was received by one Law Buang Jon at the office of the defendant and was paid to him by someone representing the plaintiff. However no receipt was given in respect of the alleged payment as that someone said that the plaintiff would come back personally to collect the receipt. So, the contention of the plaintiff here is that there is no evidence to substantiate the defendant's allegation.

On behalf of the defendant, a further affidavit in opposition was affirmed on 16 April 1993 which, *inter alia*, stated that there are serious issues to be tried in the action and the claim by the defendant against the plaintiff in the suit is not frivolous or vexatious and on the balance of convenience it is better to maintain the *status quo* as otherwise the defendant would suffer serious damage for if the caveat is removed, the plaintiff may sell and transfer the said land leaving the defendant without a security for the repayment of the said debt.

So, from the point of view of the plaintiff, it is not that the defendant has no *locus standi* to lodge

a caveat under the Land Code initially but that the caveat so lodged has ceased to operate for the defendant has lost its caveatable interest over the said land because of the Limitation Ordinance i.e. for not instituting an action against the plaintiff within the limitation period.

Notwithstanding that there is no dispute between the parties, particularly the plaintiff, that the relevant clause in the Promissory Note has conferred the caveatable interest in the defendant, for the issue was never specifically pleaded in the various affidavits, I feel I am entitled to address on the issue if the true position in law is that at the inception there is no such caveatable interest in the defendant. It is well settled law that when the question of this sort arises clearly on the evidence it is the duty of the Court when asked to give a judgement which is contrary to law to take the point although the parties may not take it. In this proceedings though this issue was never specifically pleaded but the learned counsel for the plaintiff and the defendant did make submissions on the matter. In the light of what I have said earlier, I consider the submissions on the issue is relevant to determine the true position in law.

The application of the plaintiff for the removal of the said caveat is made under s. 177 of the Land Code. The plaintiff being the registered proprietor of the said land, he is *prima facie* entitled to have an unfettered right to deal with his share in the land as he pleases. See *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212. It is then for the defendant as a caveator to satisfy the Court that on the evidence presented, its claim to an interest in the land raises serious question to be tried and then goes on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the main action.

The said caveat was lodged by the defendant pursuant to s. 173 of the Land Code. That section states as follows:

173. Any person -

(a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied or otherwise howsoever;

(b) and (c) not relevant,

may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

For the defendant to be able to lodge and maintain the said caveat, the defendant must first satisfy the Court that it has a caveatable interest in the plaintiff's said land. To have a caveatable interest the defendant must come within the category of person in s. 173(a) of the Land Code as mentioned above for in the circumstances of this proceedings paragraphs (b) and (c) of the said section do not apply. A perusal of the said caveat which is exhibited as "LC1" to the affidavit of the plaintiff affirmed on 16 June 1992 in support of the application, shows that the defendant's claim to an interest in the said land was by virtue of the Promissory Note which permits it to lodge a caveat over the plaintiff's said land. As mentioned earlier, clause 2 of the said Promissory Note permits the defendant to lodge a caveat against the said land until full payment by the plaintiff of the debt due to the defendant, as security in respect of the said sum. And clause 3 provides that the defendant is entitled to demand payment if the plaintiff failed or refused to pay in the manner therein. Therefore, it was in the contemplation of the parties that the caveat would serve as a means to ensure payment of money owed. It is not for the purpose of interim protection of rights to title to the said land or registrable interest in the said land that are alleged by the defendant but not yet proved, as stated by Lord Diplock in the case of *Eng Mee Yong supra*. There is nothing in the said clause 2 of the Promissory Note that would enable the Court to construe it to mean that the plaintiff by the Promissory Note has created an equitable charge over the said land in favour of the defendant so as to confer an interest over the said land to the defendant thereby enabling the defendant to seek in aid of the caveat to protect its claim to such an interest in the said land.

A caveat is a creature of statute and has been described as a form of injunction to restrain dealings under the Land Code: *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53. A right to caveat under the Land Code does not confer any right or interest in the caveator over land. A caveat is merely a weapon provided to protect rights or interests in land and not an instrument which creates that rights or interests. It is not sufficient that a caveat be lodged

or allowed to remain on the title solely because in some ways it is advantageous to the caveator as in this case solely for the purpose that the dealing in the said land be hampered for so long as the debt due by the plaintiff is not settled. See *Lee Ah Thaw & Anor. v. Lee Chun Tek* [1978] 1 MLJ 173. The learned counsel for the defendant submits that even if the debt due to the defendant is statute-barred, it remains an existing debt and the only avenue open to the defendant to secure repayment is by maintaining the caveat which was lodged with the express consent of the plaintiff in the Promissory Note. So, it is a case of the defendant making use of the caveat as a weapon to assure that the debt be paid and not a case to protect any right or interest in the said land.

The defendant might well argue that s. 173 of the Land Code by the use of the phrase "any unregistered agreement or other instrument" includes the Promissory Note and the agreement permitting it to caveat the said land may give rise to its having the claim to be entitled to or to be beneficially interested in the said land. In *Mohamed bin Oki v. Lau Hieng Ming* [1981] 2 MLJ 88, Tan Chiaw Thong J at p. 89 has this to say:

> To my mind, the claim must be 'by virtue of any unregistered agreement or other instrument', and in my view the words 'or other instrument' must be read as being *ejusdem generis* with the words 'any unregistered agreement' in the context where they appear particularly having regard to the definition of 'instrument' in s. 2 of the Land Code. That this is so to my mind is indicated by the presence of the word 'other' in the context just quoted. The word 'instrument' as defined in s. 2 of the Land Code means any printed or written document relating to the transfer of, or other dealing with, land, or evidencing title thereto, but does not include a caveat. The word 'dealing' in the same section is defined as meaning every transfer affecting any estate or interest under the Land Code. The two agreements do not appear to be written documents relating to the transfer of or other dealing (as defined) with, land, or evidencing title thereto, so that in my view it cannot be said that the 1st respondent is a person claiming to be entitled to or to be beneficially interested in the respective shares of the applicants in the said land by virtue of an unregistered agreement or other instrument.

In that case the agreements on which the first respondent based his claim to a caveatable interest in the land in question concerns the undertaking by the land owner who is the applicant in the case to engage and pay the caveator who is the first respondent to construct shophouses on the land of the applicant. The Court held that the agreement does not confer caveatable interest on the first respondent. Similarly, in the matter before me now, the Promissory Note does not appear to be written document relating to the transfer of or other dealing with the said land of the plaintiff or evidencing title thereto. It is a document concerning payment of debt by the plaintiff to the defendant and as a security for such payment the plaintiff permitted the defendant to caveat the said land for so long as the debt remained unpaid with the defendant given the liberty to demand immediate payment on breach of the terms contained in the Promissory Note. Therefore, the defendant cannot be said to be a person claiming to be entitled to or to be beneficially interested in the said land by virtue of an unregistered agreement or other instrument.

In the light of my finding that the Promissory Note does not confer caveatable interest upon the defendant in relation to the plaintiff's said land, thereby disentitling the defendant to caveat the same, the issue of whether or not the debt of the plaintiff is statute barred in order to determine whether the said caveat should remain on the said land becomes irrelevant. In the circumstances, I allow the application of the plaintiff and order that the said caveat of the defendant be removed from the Register forthwith as the defendant has failed to establish that it has a claim to be entitled to or to be beneficially interested in the said land as provided by s. 173 of the Land Code. As regard the prayer by the plaintiff that damages sustained by him by reason of the lodgment of the caveat be assessed, I make no order but would merely draw the attention of s. 179 of the Land Code whereby under subsection (2) the compensation for any damage alleged to be sustained shall be recoverable in an action at law. Finally, I order that the costs of and incidental to this application be paid by the defendant, to be taxed unless agreed.